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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JUDY BAKER, BONNIE JOHNSON
AND MYRA ALLISON,
Petitioners,

v.

PATRICIA HADLEY, COLUMBIA COUNTY AUDITOR,
in her official and individual capacities,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1] What is the appropriate standard to be applied to determine whether an office holder who fires individuals due to political reasons is entitled to qualified immunity? Is it appropriate to permit such an office holder to avoid qualified immunity by "imagining" job requirements, when such a holding would permit all such office holders to avoid liability for their actions?

2] In a qualified immunity case, where there are factual questions which must be resolved, is permitting the Defendant an interlocutory appeal appropriate? In the alternative, if a Defendant is entitled to an interlocutory appeal based on qualified immunity grounds, do judicial economy and pendant jurisdiction give the Court of Appeals jurisdiction over the Plaintiffs' cross-appeal on the same issue?

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The petitioners, Judy Baker, Bonnie Johnson and Myra Allison, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on December 5, 1995, as well as the interlocutory order dated May 10, 1995 which dismissed Plaintiffs' cross-appeal.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit dated December 5, 1995, is not reported. It is reprinted in the appendix hereto, p. 1. The May 10, 1995 order dismissing Plaintiffs' appeal is not reported. It is reprinted in the appendix hereto, p. 11.

The order of the United States District Court for the Northern District of Ohio (Wells, J.) has not been reported. It is reprinted in the appendix hereto, p. 16.

JURISDICTION

Petitioners filed this action in the Northern District of Ohio, pursuant to 42 U.S.C. § 1983. On December 6, 1994, the District Court issued its order partially denying Respondent's summary judgment motion.

Respondents took an interlocutory appeal from this decision, and Petitioners filed a cross-appeal. The Sixth Circuit issued an order to show cause against Petitioners, requiring them to show cause why their cross-appeal should not be dismissed. In response, Petitioners filed a response and, in the alternative, a motion to dismiss the Respondent's appeal due to its interlocutory nature.

On May 10, 1995, the Sixth Circuit dismissed Petitioners cross-appeal and denied the Petitioner's motion to dismiss. On December 5, 1995, the Sixth Circuit entered a judgment reversing the District Court's decision denying qualified immunity to the auditor and remanding the case for further proceedings.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

This case was brought pursuant to 42 U.S.C. §1983:

> **Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Introduction

The jurisdiction of the District Court was invoked pursuant to 42 U.S.C. §1983.

This petition involves an interlocutory appeal. The District Court found

> Summary Judgment is not proper in this case because the parties dispute Auditor's Hadley's awareness of Plaintiffs' political affiliation at the time of Plaintiffs' discharge. Contending assertions of Plaintiff's duties at the County Auditor's Office also require resolution by a fact-finder.
>
> [R. 49, Order, p. 4]

The facts in this case demonstrate

a) that Ms. Hadley improperly fired Plaintiffs for political reasons; and

b) that the jobs Plaintiffs performed were ones for which politics was not a legitimate job requirement.

The interlocutory appeal involved in this case deals with the issue of whether the Auditor is entitled to qualified immunity.

B. Ms. Hadley's Acts

On March 11, 1991, her first day in office, Columbiana County Auditor Patricia Hadley fired Plaintiffs Judy Baker, Bonnie Johnson and Myra Allison.

The Columbiana County Auditor Ms. Hadley replaced was Kent Bell. Ms. Hadley defeated Kent Bell in the November, 1990 election. [R. 32, Deposition of Patricia Hadley, p. 8]. The auditor before Kent Bell was Kenneth Bell, Kent Bell's father. [R. 34, Deposition of Kent Bell, pp. 5, 21].

Both Bells were Democratic office holders. [R. 32, Deposition of Patricia Hadley, pp. 14, 16]. Ms. Hadley is a Republican. [R. 32, Deposition of Patricia Hadley, p. 8].

Early on her first day as Auditor, Ms. Hadley distributed a form to her employees so they could inform her of their job duties. Prior to this, she did not know the job duties of the Plaintiffs. [R. 32, Deposition of Patricia Hadley, p. 39.]

Although she only handed out the forms when the employees arrived in the morning, by 10:30 Ms. Hadley was meeting with employees, and fired the three Plaintiffs that same day. [R. 29, Record before the State of Ohio, Personnel Board of Review, p. 226].

Ms. Baker, Ms. Allison and Ms. Johnson would have each performed their work for the Columbiana County Auditor's office to the best of their abilities, as they had under Auditor Bell, if Ms. Hadley had given them the opportunity. [see R. 37,

Allison, paragraph 5 and 6; R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Judy Baker, paragraph 7; and R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Bonnie Johnson, paragraph 3 and 9.]

C. Ms. Hadley's "Reasons" for Firing Plaintiffs were Improper Political Reasons

Nothing could be clearer than that Ms. Hadley fired Plaintiffs because of their politics. Ms. Hadley was asked

> Q: Did those discharges have anything to do with their performance as you knew it?
>
> A: Not with performance.

[R. 32, Deposition of Patricia Hadley, pp. 29 and 30.]

Her decision to fire Plaintiffs could not have been based on performance. Ms. Hadley fired Plaintiffs on her first day of work, before she had any opportunity to see Plaintiffs work. She had not worked in that office before then, nor had she observed the employees working in that office. [R. 29, Record before the Personnel Board of Review, p. 209-210].

Ms. Hadley explained her reason for firing Plaintiffs:

> It was my intention to have people work for me that were <u>loyal to me</u>.
>
> [R. 32, Deposition of Patricia Hadley, p. 28, emphasis added].

When asked what she meant by "loyal," she indicated

> I mean someone that <u>has my best interests at heart.</u>
>
> [R. 32, Deposition of Patricia Hadley, p. 28, emphasis added].

Ms. Hadley further indicated that she expects "anyone that works for me would be loyal to me twenty-four hours a day." [R. 32, Deposition of Patricia Hadley, p. 64, emphasis added]. Ms. Hadley wants her employees to be "**loyal to me personally**." [R. 32, Deposition of Patricia Hadley, p. 64, emphasis added].

Ms. Hadley had no actual basis for determining that she could not trust Ms. Baker, Ms. Johnson or Ms. Allison. [R. 32, Deposition of Patricia Hadley, pp. 79, 80].

Ms. Hadley did not ask any of the Plaintiffs whether they could work with her or accept her work philosophy. [R. 32, Deposition of Patricia Hadley, pp. 66, 67].

Ms. Hadley admitted that her reason for determining that the three plaintiffs could not work for her was because Plaintiffs had worked for Ms. Hadley's Democratic predecessors. [R. 32, Deposition of Patricia Hadley, p. 64, 65, 66.]

Additional evidence of political motivation exists because Ms. Hadley had seen Plaintiffs engaged in campaign activity for her opponent, Auditor Bell. [R. 32, Deposition of Patricia Hadley, p. 12, 13; R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Judy Baker, paragraph 9].

Ms. Hadley filled two of the three positions with Republicans. [R. 32, Deposition of Patricia Hadley, pp. 70, 74, 76]. The third position was not filled. However, at the time of the firing, Ms. Hadley did not intend to eliminate the position. [R. 32, Deposition of Patricia Hadley, pp. 70, 71].

D. Plaintiffs' Jobs were not those for which Politics was a Legitimate Job Requirement.

When the structure of the Columbiana County Auditor's office and the nature of Plaintiffs' job duties are examined, it is clear that Plaintiffs' jobs are not those for which politics is a legitimate job requirement.

The Columbiana County Auditor's office did not have written job descriptions. [R. 29, Record before the Personnel Board of Review, p. 220].

Because Ms. Hadley fired Plaintiffs on her first day, the relevant job duties are those performed for Auditor Bell.

1. The Structure of the Columbiana County Auditor's Office.

Auditor Bell, the Auditor Ms. Hadley replaced, delegated no authority to his employees to speak or act for him and no employees were entitled or authorized to make decisions for him. [R. 29, Record before the Personnel Board of Review, p. 20, 87-8]. All employees in the office reported directly to Auditor Bell [R. 29, Record before the Personnel Board of Review, p. 16] who made all the decisions. [R. 29, Record before the Personnel Board of Review, p. 54-55].

All of the Plaintiffs did routine work, following standard office procedures. None of them had any authority to change the procedures. [R. 29, Record before the Personnel Board of Review, p. 93].

None of the Plaintiffs had any authority to hire, fire or discipline other employees. [R. 29, Record before the Personnel Board of Review, p. 96-7].

According to Auditor Bell none of the three Plaintiffs served in a fiduciary capacity or bore a confidential relationship to him. [R. 29, Record before the Personnel Board of Review, p. 90].

None of the three Plaintiffs performed duties which another person could not do with training. [R. 29, Record before the Personnel Board of Review, p. 98].

Ms. Hadley has continually mis-characterized Plaintiffs' job descriptions. The only information that she had as to plaintiffs' job duties, prior to taking office, was a letter from Auditor Bell. [R. 32, Deposition of Patricia Hadley, page 32, 33] which indicated that Plaintiffs had the following job descriptions when discharged:

1) Ms. Allison: "Budgetary Financial Specialist";

2) Ms. Johnson: "Settlements/Abstracts/ Tax Rate Operator Specialist"; and

3) Ms. Baker: "Estate Tax/Estate Inventory/ Licenses Clerk."

[R. 32, Letter from Kent Bell to Patricia Hadley, dated January 16, 1991, identified as Hadley Plaintiffs' Deposition Exhibit 1].

2. Plaintiffs' Job Duties.

The Plaintiffs' actual job duties demonstrate that their jobs were not jobs where politics is a legitimate job requirement.

a. Myra Allison's Job Duties.

Ms. Allison was not a supervisor, nor did she have any policy-making authority. [R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Myra Allison, paragraph 2, 3].

Ms. Allison did not have any authority to make decisions for, or act on behalf of, the Auditor. [R. 29, Record before the Personnel Board of Review, p. 119].

Ms. Allison was a Budgetary Financial Specialist. Her job could be done by anyone trained to do it. [R. 29, Record before the Personnel Board of Review, p. 121]. In fact, while Ms. Allison was on maternity leave from March to May 1990, someone else was trained to do and did her work. [R. 29, Record before the Personnel Board of Review, p. 121].

b. Bonnie Johnson's Job Duties.

Bonnie Johnson did not supervise anyone, nor did she have any policy-making authority. [R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Ms. Johnson, paragraph 2].

Much of her work was done with pre-printed forms. Her work was taken to the Auditor for his review and signature. [R. 29, Record before the Personnel Board of Review, p. 145].

Defendant claims that Ms. Johnson was the Chief Deputy Auditor, because at one time she had that title.

However, **she did not have the title at the time she was fired.** She had resigned her title.

Ms. Johnson's title at the time she was terminated was "Settlements/Abstracts Tax Rate Operator Specialist." [R. 32, Letter from Kent Bell to Patricia Hadley, dated January 16, 1991, identified as Hadley Plaintiffs' Deposition Exhibit 1].

Nor was there any evidence to show that the title, Chief Deputy Auditor, which Ms. Johnson briefly held at an earlier time, brought with it any job duties other than those which she had both before and after. Ms. Johnson had no authority to speak, vote or act for the Auditor. [R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Ms. Johnson, paragraph 4]. Ms. Johnson could not hire, fire or discipline employees, nor did she control employee schedules or work rules. [R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Ms. Johnson, paragraph 11, 12].

Ms. Johnson was not in charge of the Auditor's office in the Auditor's absence. [R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Ms. Johnson, paragraph 5]. She was not authorized to make decisions or judgments for the Auditor. [R. 29, Record before the Personnel Board of Review, p. 87].

c. Judy Baker's Job Duties.

Ms. Baker performed a variety of job duties for the Auditor's office. Many of the duties which she performed were also performed by other employees of the Auditor's office. [R. 29, Record before the Personnel Board of Review, p. 184].

Ms. Baker did not oversee or supervise anyone. [R. 29, Record before the Personnel Board of Review, p. 183]. Ms. Baker had no policy making or supervisory authority. She did not have any authority over employees. [R. 37, Notice by Plaintiffs of Filing of Affidavits: Affidavit of Judy Baker, paragraph 2, 3, 5, 6].

Although Ms. Baker had once held the title of office manager, **it was clearly not her job title at the time of the removal.**

There was no difference in the duties she performed before, after, or during the short period of time she had that title. [R. 29, Record before the Personnel Board of Review, p. 173]. Even in the brief period she had the title of office manager, she did not have authority over employees. [R. 29, Record before the Personnel Board of Review, p. 96].

It was uncontradicted that she had resigned her title as office manager.

Ms. Baker's actual job title at the time she was discharged was "Estate Tax/Estate Inventory/Licenses Clerk." [R. 32, Letter from Kent Bell to Patricia Hadley, dated January 16, 1991, identified as Hadley Plaintiffs' Deposition Exhibit 1].

REASONS FOR GRANTING THE WRIT

A. THE APPLICATION OF *HARLOW* TO SITUATIONS INVOLVING POLITICAL DISCHARGE IS UNCERTAIN, AND THE DECISION OF THE SIXTH CIRCUIT IN THE PRESENT CASE WOULD RENDER *HARLOW* MEANINGLESS IN CASES INVOLVING POLITICAL DISCHARGE BY EFFECTIVELY PROVIDING IMMUNITY TO ALL OFFICE HOLDERS.

1. Introduction

This case involves the issue of the qualified immunity exception of *Harlow v. Fitzgerald*, 457 U.S. 807 (1982), as it relates to situations of improper political discharge pursuant to *Elrod v. Burns*, 427 U.S. 347 (1976).

Harlow held that

> If the law was clearly established, the immunity defense ordinarily should fail, since **a reasonably competent public official should know the law governing his conduct**.
>
> Harlow at 818. [Emphasis added].

Elrod held that a non-civil service employee cannot be fired due to politics. *Elrod* was decided in 1976, fifteen years before Defendant Hadley's actions in this case.

Defendant Hadley's acts are identical to those before the United States Supreme Court in *Elrod v. Burns*, 427 U.S. 347 (1976). Therefore, the present case does not involve law which "was not clearly established." The law on this matter had been clear for over fifteen years before Defendant's acts.

Elrod clearly applied to firing decisions — and therefore Ms. Hadley is subject to personal liability for her acts. It cannot be claimed in good faith that an elected official could not be aware of the import of the *Elrod* decision.

The District Court in this case denied both parties' motions for summary judgment on the qualified immunity issue because

> [d]epending on results of fact-finding regarding Plaintiffs' roles at the County Auditor's Office prior to their discharge, qualified immunity may or may not apply. Material issues of fact between the parties prevent summary disposition of qualified immunity issues before the Court.
>
> [R. 49: Order at p. 6.]

The Court of Appeals in this case held that the district court had applied the wrong standard. The Court of Appeals held that the standard for application of qualified immunity was

> the court must examine the inherent duties of that position and the duties that the new hiring authority, *i.e.*, Hadley, reasonably envisions that the holder of that position will perform.
>
> [Court of Appeals at p. 9.]

This standard, enunciated by the Court of Appeals is improper.

2. The Sixth Circuit's Decision conflicts with a decision of the Seventh Circuit.

Initially, the Sixth Circuit's decision conflicts with the decision of the Seventh Circuit in *Nekolny v. Painter* 653 F.2d 1164 (CA7 1981), U.S. cert. den. 455 U.S. 1021.

The Defendant in *Nekolny* was not entitled to qualified immunity because as a result of the *Elrod* decision

> it is clear that the law was not unsettled on this point. [*i.e.* whether individuals could be fired for political reasons]
>
> *Nekolny* at 1171.

By contrast, the Sixth Circuit has held that this matter was unsettled.

Nekolny recognized that qualified immunity would not apply to a situation involving a political firing:

> Without reaching the issue of her subjective intent we conclude that the trial judge properly determined that [Defendant] knew or should have known that her acts were constitutionally infirm.
>
> *Nekolny* at 1171.

By contrast, the Court in the present case held that the relevant standard was a subjective one — *i.e.* what the office holder intended.

3. The Sixth Circuit's decision applies an improper standard. Under the Sixth Circuit's decision, all office holders would be able to receive qualified immunity, because the Sixth Circuit in this case has determined to look at what the office holder intends, rather than what the job duties are.

What is the appropriate test for determining application of qualified immunity to political discharge cases?

The Sixth Circuit has held in the present case that the proper standard is what the office holder intended the job duties to be. As the Sixth Circuit noted, the record does not contain evidence of what duties Ms. Hadley envisioned. The record is barren because she did not envision anything.

This holding is nothing more than an invitation to office holders to engage in revisionism. If allowed to stand, this standard would permit any office holder to avoid liability. All that they would have to do to get rid of an employee is to "imagine" job duties which would place the employee in the category where politics is a legitimate job requirement.

Such a standard would strip employees of the protections set forth by this Court in *Elrod*. It would provide a "license to lawless conduct" which was not intended by the Supreme Court in *Harlow*. *Harlow* at 819.

In the present case, there were no "job duties" as such. The office had no policy manual or job descriptions. Therefore, the sole relevant inquiry is into what the Plaintiffs actually did in their jobs.

The inquiry must be limited to what the Plaintiffs did in their jobs. Otherwise, any office holder could come into office and with unrestricted fertile imagination "restructure" the office in such a way which would permit them to eliminate any and every employee they want.

B. IN CASES INVOLVING QUALIFIED IMMUNITY, WHERE THERE ARE QUESTIONS OF FACT, AN INTERLOCUTORY APPEAL IS INAPPROPRIATE; IN THE ALTERNATIVE, IF AN INTERLOCUTORY APPEAL BY THE DEFENDANT ON THE DENIAL OF SUMMARY JUDGMENT IS APPROPRIATE, A CROSS-APPEAL OF THE SAME ISSUE BY THE PLAINTIFFS IS ALSO APPROPRIATE.

1. **Where a qualified immunity issue depends on resolution of a factual dispute, the Court of Appeals lacks jurisdiction over an interlocutory appeal.**

This case involves a qualified immunity issue. Under certain circumstances, the Court will have jurisdiction over an interlocutory appeal from a denial of a summary judgment motion on the qualified immunity issue. Such an exception only applies where the determination "turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 526-528.

Those circumstances do not apply here:

> Jurisdiction, however, is limited to circumstances where the qualified immunity defense may be established as a matter of law and "is not available where the immunity issue turns on disputed questions of fact." Indeed, we lack jurisdiction when the determination of material factual issues is "a necessary predicate" to a resolution of whether qualified immunity is a bar to the litigation.
>
> *O'Neill v. Town of Babylon*, 986 F.2d 646, 649 (CA2 1993), [citations omitted]; see also *Hale v. Townley*, 19 F.3d 1068 (CA5 1994); *Meyer v. Robinson*, 992 F.2d 734 (CA7 1993).

The Sixth Circuit's determination to grant an interlocutory appeal in this instance, where there is a question of fact was therefore inappropriate. The district court specifically found that the resolution of the qualified immunity issue depended upon determination of disputed facts.

If the Court lacks jurisdiction where there is a factual dispute, it acted improperly by considering the interlocutory appeal in the present case.

2. **If the Court has jurisdiction to consider an interlocutory appeal from the defendant on the qualified immunity issue, it also has jurisdiction to consider an interlocutory appeal from the plaintiffs on the qualified immunity issue.**

Plaintiffs filed a cross-appeal because they believe that there are no set of circumstances under which the defendant is entitled to qualified immunity.

To the extent that the Court of Appeals would have jurisdiction over an interlocutory appeal, it could only have been due to there being a legal [rather than a factual] issue involved.

In such an instance, notions of judicial economy mandate that the Court consider Plaintiffs' appeal on the same issue.

The issue involved in plaintiffs' appeal was completely identical to that raised in defendants.

For this reason, the Court had jurisdiction over the Plaintiffs' appeal, and it was improper to dismiss the appeal:

> We may, in our discretion, exercise pendant jurisdiction over an otherwise nonappealable district court decision, if we already have jurisdiction over another issue in the same case.
>
> *Kelly v. Curtis*, 21 F.3d 1544, 1555 (CA11 1994)

A reason for exercising such pendant jurisdiction is "judicial economy". *Kelly* at 1556.

Judicial economy is aided by considering Plaintiffs' appeal concurrent with defendants. The exact issues -- both legal and factual -- are involved. Nothing additional will need to be done by the Court.

On the other hand, failure to consider Plaintiffs' appeal concurrently will result in the matter having to be reheard again.

For this reason, the case of *Weaver v. Brenner*, 40 F.3d 527 (CA2 1994) cited in the "show cause" order does not apply.

Weaver refused to consider a cross-appeal under pendant jurisdiction (where the appeal involved a qualified immunity issue), because

> To resolve this issue requires a legal inquiry totally separate and distinct from that necessary to the issue plaintiff wishes us to address . . .
>
> Nor is there significant overlap in the facts relevant to each inquiry present . . . Since there is no intertwining of the factors relevant to the appealable and nonappealable issues, we decline to exercise discretion to review plaintiff's cross-appeal . . .
>
> *Weaver* at 538, emphasis added.

This case is the exact opposite situation from *Weaver*. Here, the legal inquiry rather than being "separate and distinct" is completely identical. Furthermore, not only is there "significant overlap in the facts" -- the facts are identical.

For these reasons, the Court should exercise its pendant authority and resolve the issue. This is because, as the Court in *Weaver* recognized:

> Since we have exercised jurisdiction over an issue in this case, we may consider other nonappealable issues in our discretion, if the appealable and nonappealable issues sufficiently overlap to warrant our exercising plenary authority over the appeal. We also avoid the waste of scarce judicial resources . . .
>
> *Weaver* at 537-8, emphasis added.

Because judicial economy will be aided — and because the issues are identical — the Court of Appeals should have considered Plaintiffs' cross-appeal on the issue of qualified immunity.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted

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APPENDICES

NOT FOR PUBLICATION

No. 95-3038

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDY BAKER; MYRA ALLISON; and BONNIE JOHNSON, Plaintiffs-Appellees, v. PAT HADLEY, Columbiana County Auditor, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: ENGEL, MILBURN, and NORRIS, Circuit Judges.

PER CURIAM. Defendant Pat Hadley appeals the district court's order denying her motion for summary judgment based on qualified immunity in this civil rights action arising under 42 U.S.C. § 1983. On appeal, the issue is whether the district court erred in determining that material issues of fact required it to deny defendant's motion. For the reasons that follow, we reverse and remand.

I.

A.

Defendant Pat Hadley, a Republican, was elected to the position of Columbiana County (Ohio) Auditor in November 1990. In the election, Ms. Hadley defeated the Democratic incumbent, Kent Bell. Prior to Kent Bell's term as Columbiana County Auditor, the office was held by his father, Kenneth Bell, who was also a Democrat. Plaintiffs Judy Baker, Bonnie Johnson, and Myra Allison worked in the County Auditor's office under both Kent and Kenneth Bell. In their complaint, plaintiffs state that they had each publicly expressed their support for Kent Bell before the election.

At the time that defendant Hadley was elected, plaintiffs Judy Baker and Bonnie Johnson held the positions of office manager and chief deputy auditor, respectively. However, on December 17, 1990, prior to the date Hadley took office, both Baker and Johnson submitted resignations from their job titles but continued to work for Auditor Bell. Baker and Johnson's job responsibilities did not change after they resigned from their respective titles. Prior to taking office, Auditor-Elect Hadley received a letter from then Auditor Bell that provided Hadley with descriptions of plaintiffs' jobs. Bell described plaintiff Baker's position as "Estate Tax/Estate Inventory/License Clerk," plaintiff Johnson's position as "Settlements/Abstracts/Tax Rate Specialist," and plaintiff Myra Allison's position as "Budgetary Financial Specialist." J.A. 568. In their complaint, plaintiffs alleged that their positions were"neither policy-making nor confidential." J.A. 9.

Defendant Hadley took office on March 11, 1991. That day, she requested that all employees of the Auditor's office complete "desk audits," which required the preparer to describe

his or her job duties and responsibilities. In her deposition, Hadley explained that the purpose of the desk audits was to determine who she needed to "trust and rely on." J.A. 505. Based on these desk audits and Hadley's previous dealings with the County Auditor's office, Hadley concluded that plaintiffs were in managerial positions that required their complete trust and loyalty. Because Hadley felt that plaintiffs would not be completely loyal to her and would not adapt to her philosophy of how the County Auditor's office should be run, Hadley discharged plaintiffs that same day, March 11, 1991.

B.

On March 9, 1992, plaintiffs Judy Baker, Myra Allison, and Bonnie Johnson filed a three-count complaint against defendant Pat Hadley. Plaintiffs brought their claims under 42 U.S.C. §§ 1983, 1985, and 1988, and under Ohio law. Count I alleged that Hadley violated plaintiffs' First and Fourteenth Amendment rights of freedom of speech and political affiliation by discharging them because they supported the Democratic incumbent, Kent Bell, in the election. Count II alleged that plaintiffs were terminated in violation of their First and Fourteenth Amendment rights with regard to their attempts to unionize the County Auditor's office. Count III alleged that their termination because of their union activity also constituted wrongful discharge under Ohio law.

On April 7, 1994, defendant Hadley filed a motion for summary judgment arguing, among other things, that she was entitled to qualified immunity as to Count I of the complaint. Plaintiffs filed a motion for partial summary judgment regarding defendant's assertion of qualified immunity on May 4, 1994. On December 6, 1994, the district court granted in part and

denied in part defendant's motion for summary judgment and denied plaintiffs' motion. The district court denied defendant's motion for summary judgment on qualified immunity grounds as to Count I of the complaint because it concluded that material issues of fact regarding plaintiffs' duties at the County Auditor's office and Hadley's awareness of plaintiffs' political affiliations at the time of plaintiffs' discharge prohibited summary disposition of the qualified immunity issues.

On January 4, 1995, defendant filed a notice of appeal limited to the issue of the district court's denial of her motion for summary judgment on qualified immunity grounds. Plaintiffs filed a notice of cross-appeal, in which plaintiffs raised issues other than qualified immunity, on January 18, 1995, but this court dismissed plaintiffs' appeal for lack of jurisdiction due to its interlocutory nature.

II.

Defendant argues that the district court erred in denying her motion for summary judgment based on qualified immunity. Specifically, defendant asserts that the district court failed to determine whether the law that plaintiffs allege that she violated was clearly established at the time she fired plaintiffs because the district court improperly found that genuine issues of material fact precluded this determination. In its order denying defendant's motion for summary judgment based on qualified immunity as to plaintiffs' claim that defendant fired them because of their political affiliations, the district court found that "[d]ischarge of non policymaking, nonconfidential public employees because of political affiliation violates the First and Fourteenth Amendments to the United States Constitution." J.A. 16. However, the district court concluded that "[s]ummary judgment is not proper in this case because the parties dispute

Hadley's awareness of Plaintiffs' political affiliation at the time of Plaintiffs' discharge" and because the parties dispute what the "Plaintiffs' duties [were] at the County Auditor's Office." J.A. 17.

This court has held that a denial of a claim of qualified immunity is immediately appealable. *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).[1] Because application of the doctrine of qualified immunity to a particular defendant is question of law, we review the district court's determination de novo. *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). It is well established that government officials performing discretionary functions generally are shielded from personal liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Buckner v. Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994). Generally, in determining whether a right is clearly established, a district court must look to precedent from the Supreme Court, the Sixth Circuit, or from itself. *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). Decisions of other courts may also clearly establish the law when such

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[1] The Supreme Court has recently held in *Johnson v Jones*, 115 S. Ct. 2151 (1995), that a defendant may not immediately appeal a district court's denial of summary judgment based on qualified immunity where the district court finds that a genuine issue of material fact precludes summary judgment *Id.* at 2153. However, *Johnson* is not applicable to this case because, as later discussed, the district court erred in its analysis of whether the law prohibiting discharge of public employees in plaintiffs' positions because of their political affiliation was clearly established at the time of defendant's conduct.

determinations "both point unmistakenly to the unconstitutionality of the conduct and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Cagle*, 957 F.2d at 1348. The Supreme Court has also instructed that when analyzing whether a right is clearly established, the court must carefully define the right at issue:

> The operation of this ["clearly established law"] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639. *Accord Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir.), *cert. denied*, 64 U.S.L.W. 3210 (1995).

In concluding that at the time Hadley discharged plaintiffs, the law was clearly established that non policymaking, nonconfidential public employees could not be fired because of their political affiliation, the district court relied on the Supreme Court's decisions in *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976), and *Branti v. Finkel*, 445 U.S. 507, 518-19 (1980). In *Elrod*, a plurality of the Court concluded that "a non policymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod*, 427 U.S. at 375. In *Branti*, the Court clarified the test of whether politically motivated personnel decisions violate the First Amendment and stated that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Branti*, 445 U.S. at 518. Thus, the Court abandoned the labels of "policy maker" and "confidential employee," and held that the relevant issue is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* Applying this test, the Court in *Branti* concluded that a public defender's continued employment could not be dependent on his allegiance to the dominant political party. *Id.* at 519.

Courts have applied the *Elrod* and *Branti* framework for assessing the constitutionality of patronage dismissals on a case-by-case basis, examining each position individually. *Mumford*, 4 F.3d at 434 (stating that courts have found it impossible to identify generic categories of positions where partisan selection

and rejection are permissible). In this regard, this court has analyzed the duties and responsibilities of several positions and held that they did not enjoy the right to be free from patronage dismissal. *See, e.g., Mumford*, 4 F.3d at 435 (chief referee); *Cagle*, 957 F.2d at 1349 (deputy sheriff); *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991) (secretary to mayor); *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991) (assistant prosecutor); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney); *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989) (county flood plain administrator); and *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988) (court bailiff). We have instructed that when analyzing "whether political considerations are appropriate in making personnel decisions *for a certain position*, we must examine the inherent duties of that position and the duties that the new holder of that position will perform." *Faughender*, 927 F.2d at 913 (emphasis added). *Accord Williams*, 909 F.2d at 155. Thus, "a court must examine the position . . . itself, rather than the position as performed by [the plaintiff]," *Williams, 909* F.2d at 155, when determining whether political beliefs are an appropriate requirement for the position." *Faughender*, 927 F.2d at 913.

In this case, the district court found that at the time Hadley fired plaintiffs, it was clearly established that nonpolicymaking, nonconfidential employees were protected from being fired because of political affiliation under the First and Fourteenth Amendments. However, the district court also found that material issues of fact regarding plaintiffs' job duties at the County Auditor's office precluded summary judgment. Thus, the district court erred in its analysis of whether the law prohibiting patronage dismissals was clearly established at the time Hadley dismissed plaintiffs by failing to consider whether it was clearly

established that employees *in the particular positions at issue in this case*, in light of the responsibilities inherent in those positions, were protected from patronage dismissal. *See Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1259 (1st Cir. 1987) (holding that it is not sufficient to state generally that *Elrod* and *Branti* clearly establish that the First Amendment protects government employees from discharges based on political affiliations).

This determination is not precluded by the parties' dispute regarding plaintiffs' previous job duties at the County Auditor's office under Auditor Bell. In *Faughender*, we explained that when determining whether political considerations are appropriate in making personnel decisions for a certain position a district court should not look to the duties previously performed by the plaintiff. Instead the court must examine the inherent duties of that position and the duties that the new hiring authority, *i.e.*, Hadley, reasonably envisions that the holder of that position will perform. *Faughender*, 927 F.2d at 913. In this case, the record does not contain any evidence of what duties Hadley envisioned that the holders of plaintiffs' positions would perform. We hold that the district court erred by failing to consider the duties inherent in plaintiffs' particular positions and Hadley's plans for the employees holding such positions in determining whether the law was clearly established that plaintiffs' positions were protected from patronage dismissal at the time that Hadley discharged plaintiffs, and we shall remand these questions to the district court for further consideration.

III.

For the reasons stated, the order of the district court denying defendant's motion for summary judgment based on qualified immunity is REVERSED, and the case is REMANDED to the district court in order that it may determine whether it was clearly established at the time defendant Hadley fired plaintiffs that public employees in plaintiffs' positions could not be fired because of their political affiliations. We, however, do not suggest or imply what the eventual outcome of this issue should be.

No. 95-3038/3079

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDY BAKER; MYRA ALLISON; and BONNIE JOHNSON,

Plaintiffs-Appellees,

v.

PAT HADLEY, Columbiana County Auditor,

Defendant-Appellant.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: SUHRHEINRICH and DAUGHTREY, Circuit Judges; and HEYBURN, District Judge.*

The defendant appeals a district court order denying her motion for summary judgment on grounds of qualified immunity in this case brought by public employees who allege they were terminated from their employment in retaliation for exercising their constitutional rights. The plaintiffs cross-appeal from that portion of the district court's order which grants summary

* The Honorable John G. Heyburn, II, United States District Judge for the Western District of Kentucky, sitting by designation.

judgment for the defendant on Count Two of the plaintiffs' complaint. On February 10, 1995, an order was entered directing the Plaintiffs to show cause why their cross-appeal in Case No. 95-3079 should not be dismissed for lack of jurisdiction. The plaintiffs have filed a response to the show cause order and move to dismiss the defendant's appeal in Case No. 95-3038. The defendant has filed a response opposing the dismissal of her appeal.

Upon review of the facts and arguments presented, we conclude that we have jurisdiction over the defendant's appeal. The denial of a claim of qualified immunity is immediately appealable under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Kennedy v. City of Cleveland*, 797 F.2d 297, 304-05 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). "For an official's discretionary actions to be protected under the doctrine [of qualified immunity] the inquiry generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Meyers v. City of Cincinnati*, 979 F.2d 1154, 1156 (6th Cir. 1992) (internal quotations and citations omitted). Thus, the issues on appeal are (1) whether the plaintiffs' allegations, if accepted as true, demonstrate a violation of clearly established rights by the defendant and (2) whether a reasonable official in the defendant's position should have should have understood that her conduct violated those rights. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). These are purely legal questions for the trial judge to determine prior to trial. *Mumford v. Zieba*, 4F.3d 429, 432 (6th Cir. 1993). Such questions are immediately reviewable under *Mitchell v. Forsyth*.

We will not, however, exercise appellate jurisdiction at this time over issues other than the defendant's immunity defense. *See Rich v. Mayfield Heights*, 955 F.2d 1092, 1094 (6th Nos.

Cir. 1992); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 566-68 (6th Cir.), *cert. denied, sub. nom. Walker v. Huron Valley Hosp., Inc.*, 479 U.S. 885 (1986). The dismissal of Count Two of the plaintiffs' complaint was not based on a finding of qualified immunity. Accordingly, the plaintiffs' cross-appeal will be dismissed. The plaintiffs may raise, as part of the defendant's appeal, any arguments they may have in support of affirming the district court's denial of qualified immunity.

It therefore is ORDERED that the plaintiffs' cross-appeal in Case No. 95-3079 is dismissed *sua sponte* for lack of appellate jurisdiction. The motion to dismiss the defendant's appeal in Case No. 95-3038 is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

No. 95-3079

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDY BAKER; MYRA ALLISON; and BONNIE JOHNSON,	)	
Plaintiffs-Appellees, Cross-Appellants,	)	
	)	ORDER
v.	)	
PAT HADLEY, Columbiana County Auditor,	)	
Defendant-Appellant. Cross-Appellee.	)	

The plaintiffs cross-appeal from a district court order granting partial summary judgment for the defendant and denying plaintiffs' cross-motion for partial summary judgment. The defendant, in Case No. 95-3038, has filed an notice of appeal from that portion of the district court's order which denies her summary judgment on grounds of qualified immunity. An initial review of the district court docket sheet suggests that jurisdiction is lacking over plaintiffs' cross appeal.

Under 28 U.S.C. § 1291, courts of appeals have jurisdiction only over final decisions of the district court. A decision is final if it leaves nothing remaining for the district court to do except execute final judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). In the present case, the order appealed from

does not dispose of Counts 1 and 3 of the plaintiffs' complaint. The order granting partial summary judgment for the defendant is therefore, interlocutory. *Cf. Oak Construction Company v. Huron Cement Company*, 475 F.2d 1220 (6th Cir. 1973) (per curtain) (no jurisdiction over interlocutory orders under 1291). Neither will the qualified immunity exception, which permits this court to consider the defendant's interlocutory appeal, allow the court to consider an unrelated cross-appeal. See Weaver v. Brenner, 40 F. 3d 527 (2d Cir. 1994).

It is therefore ORDERED that the plaintiffs show cause in writing no later than 21 days after entry of this order why this appeal should not be dismissed for lack of appellate jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s/ Leonard Green/js

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDY BAKER; et al.;	)	JUDGE LESLEY
	)	BROOKS
	)	WELLS
Plaintiffs-Appellees,	)	CASE NO. 4: 92 CV 495
	)	
vs	)	ORDER
	)	
PAT HADLEY,	)	
	)	
Defendant.	)	

BACKGROUND

Plaintiffs, Judy Baker ("Baker"), Myra Allison ("Allison") and Bonnie Johnson ("Johnson") filed a three-count complaint against Defendant, Patricia Hadley ("Hadley") in March, 1992. Plaintiffs allege in March, 1991, Hadley, a Republican, replaced an incumbent Democrat, Kent Bell ("Bell"), as Columbiana County Auditor. Plaintiffs worked in the County Auditor's office since the 1970's and campaigned for Hadley's opponent in the prior election. Plaintiffs were terminated without notice on March 11 when Hadley assumed office.

Plaintiffs claim civil rights violations pursuant to 42 U.S.C. §§ 1983, 1985, and 1988 and wrongful discharge under Ohio law. In Count 1, Plaintiffs suggest they were discharged in violation of their First and Fourteenth Amendment rights of speech and political association with regard to their activities on Bell's campaign. In Count 2, Plaintiffs argue they were discharged in violation of their First and Fourteenth Amendment rights with regard to attempts to unionize the County Auditor's office. Plaintiffs contend this claim is a First Amendment claim rather

than any claim under federal or state labor relations law. Plaintiffs allege their state-law wrongful discharge claim in Count 3.

The case was originally assigned to District Judge Alvin I. Krenzler. Following Judge Krenzler's retirement, the case was supervised by Chief Judge Thomas D. Lambros. On February 17, 1994, the case was reassigned to this Court (Docket No. 25).

Pending before the Court are Defendant's motion for summary judgment (Docket No. 28) and Plaintiffs' motion for partial summary judgment (Docket No. 36). The Court has reviewed the memoranda, affidavits, and certificates submitted by the parties and oral arguments of counsel during the December 2, 1994 hearing. For the following reasons, Defendants' motion for summary judgment is denied on Counts 1 and 3 and granted on Count 2. Plaintiffs' motion, which addressed the limited issue of qualified immunity, is denied in full.

SUMMARY JUDGMENT STANDARD

Summary judgement is proper when, "pleading, depositions, answers to interrogatories . . . . together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." F. R. Civ. P. 56(c). After adequate time for discovery, summary judgment should be granted against a party bearing the burden of proof if they fail to make a sufficient showing on an essential element of their case. *Celotex Corp. V. Catrett*, 477 U.S. 317, 322-23 (1986) ("There can be 'no issue of material fact,' since a complete failure of proof concerning an essential element of the non moving party's case necessarily renders all other facts immaterial"). The standard for summary judgment mirrors the standard for a directed verdict under F. R. Civ. P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment should be granted if under governing law, there can be but one reasonable conclusion as to the verdict. *Id.*.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COUNT 1

Material issues of fact dictate that Hadley's motion for summary judgment on Plaintiffs' civil rights claims of retaliatory political discharge be denied. Discharge of non policymaking, nonconfidential public employees because of political affiliation violates the First and Fourteenth Amendments to the United States Constitution. *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (political discharge of employees of Sheriff's office violated the First and Fourteenth Amendments); *Branti v. Finkel*, 445 U.S. 507, 518-19 (1980) (political discharge of public defenders violated First and Fourteenth Amendments); *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989) (district court grant of summary judgment for defendant who discharged a County Flood Administrator for political reasons reversed).

Summary judgment is not proper in this case because the parties dispute Hadley's awareness of Plaintiffs' political affiliation at the time of Plaintiffs' discharge. Contending assertions of Plaintiffs' duties at the County Auditor's office also require resolution by a fact-finder.

Hadley's argument that Plaintiffs' civil rights Claims are precluded lacks merit. The findings of an Administrative Law Judge ("ALJ") for the Ohio State Board of Personnel Review ("SBPR") are not binding on this Court. The legal definition of "classified" versus "unclassified" employment is not determinative of the First Amendment standard of "policymaking" and "confidential" under *Branti* and *Elrod*. The ALJ did not consider Plaintiffs' civil rights claims on the merits. For these reasons, Plaintiffs' claims are entitled to full consideration before this Court.

COUNT 2

In Count 2, Plaintiffs' raise a civil rights claim regarding their attempts to unionize the County Auditor's office. Hadley argues this claim is barred by the Ohio limitations period for unfair labor practice claims. However, the Ohio limitations period is not relevant to this claim. Plaintiffs' claim derives from the Constitution and federal civil rights statutes, rather than state labor relations law.

Hadley's motion should be granted on Count 2 because Plaintiffs' have not set forth a prima facie case of retaliatory discharge for constitutionally protected activity. In *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991), the Court held evidence of a defendant's knowledge of a plaintiff's union activity is required for a First and Fourteenth Amendment claim of retaliatory discharge. Plaintiffs do not provide any evidence demonstrating Hadley was aware that Plaintiffs' were involved in a union organization drive. Under *Monks*, the claims in Count 2 cannot succeed as a matter of law.

COUNT 3

Plaintiffs allege a state-law claim of wrongful discharge in Count 3. Hadley argues summary judgment is proper because Plaintiffs have no action for wrongful discharge under Ohio law.

Ohio recognizes a public policy exception to the general rule of at-will employment. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228 (1990). A claim of wrongful discharge may be maintained when employees are discharged in contravention of a clear public policy, derived from state or federal constitutional law. *Painter v. Graley*, 70 Ohio St. 3d 377 (1994). If proven, the facts alleged by the Plaintiffs suggesting they were discharged in retaliation for exercising their constitutional rights, could comprise a wrongful discharge claim under Ohio law.

Plaintiffs' motion for summary judgment addresses Hadley's qualified immunity defense. Hadley contends qualified immunity shields her from personal liability in this case.

If the law is clearly established, a defense of qualified immunity should fail because a reasonably competent public official should know the law governing her conduct. *Harlow v. Fitzgerald*, 457 U.S. 807, 818 (1982). Depending on results of fact-finding regarding Plaintiffs' roles at the County Auditor's office prior to their discharge, qualified immunity may or may not apply.[1] Material issues of fact between the parties prevent summary disposition of qualified immunity issues before the Court.

CONCLUSION

Defendant's motion for summary judgment is granted in part and denied in part. Plaintiffs' motion is denied. The parties may proceed to trial on claims contained in Counts 1 and 3 of Plaintiffs' complaint.

All parties and counsel of record shall attend a Status Conference with the Court on January 17, 1995 at 3:30 p.m.

IT IS SO ORDERED

/S/ Lesley Brooks Wells
UNITED STATES DISTRICT JUDGE

[1] Summary judgment on qualified immunity is especially inappropriate given the potential impact of Baker and Johnson's resignation of supervisory authority in December, 1990.

(2)

No. 95-1406

Supreme Court, U.S.
FILED
MAY 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

JUDY BAKER, BONNIE JOHNSON and MYRA ALLISON,

Petitioners,

vs.

PATRICIA HADLEY, COLUMBIA COUNTY AUDITOR, in her official and individual capacities,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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22 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent, Patricia Hadley, is insured by a publicly owned corporation, American International Group, Inc., which may have a financial interest in the outcome of this litigation.

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STATEMENT OF THE CASE

A. Introduction

The Sixth Circuit Court of Appeals' holding is limited to a remand to the District Court for a determination of whether there was clearly established law regarding the particular positions occupied by the Petitioners at the time of their dismissal.

This controversy arose because Patricia Hadley, the newly elected Columbiana County, Ohio, Auditor, desired to have loyal employees occupying the upper management positions of her office. There was not a wholesale firing in the office. The vast majority of her predecessor's office staff was left intact.

The Court of Appeals also ruled that a court must examine the inherent duties of the position in question and the duties that the new holder of that position will perform. [Court of Appeals at p. 8]. The court stated that the record in the District Court did not contain any evidence of what Patricia Hadley envisioned for the positions in question.

Therefore, this writ should not be granted as the Sixth Circuit Court has held the record is lacking of necessary facts. It would be more economic judicially for the case to be remanded to the District Court for the record to be supplemented and for a decision to be made. At that point an appeal may not be necessary, but would then be permissible. *Behrens v. Pelletier*, 516 U.S. __, 133 L. Ed. 2d 733 (1996). Moreover, as detailed herein, the Sixth Circuit did not err as to law in reversing the District Court.

B. The Underlying Facts

In November, 1990, longtime Democratic incumbent Columbiana County Auditor, Kent Bell, was defeated by

Republican opponent, Patricia Hadley, now Columbiana County Auditor, in the general election. Shortly after Bell's defeat, certain employees of the Auditor's office sought Union representation in order to protect their jobs. [R. 30: Deposition of J. Baker at pp. 26 and 27].

Two employees, Judy Baker and Bonnie Johnson (Petitioners in the present case), resigned their positions as "officer manager" and "Chief Deputy Auditor", respectively, on the same date, December 17, 1990. Their resignations were effected so that these employees could become eligible to join the then forming bargaining unit. [R. 29: Administrative transcript of Personnel Board of Review at p. 83 ("A.T. at 83")]. Neither of these employees suffered a commensurate reduction in pay nor were their job duties or responsibilities altered in the slightest way after their resignations. (*Id.*).

On March 11, 1991, Pat Hadley took office. On her first day, she had all employees of the Auditor's office complete "desk audits" which were detailed descriptions of their job duties, responsibilities and related information. [R. 28: Exhibits 3, 4 and 5 attached to Respondent's Motion for Summary Judgment].

Later that same day, March 11, 1991, Pat Hadley met with Petitioners and informed them that they had been dismissed. The only evidence before the trial court was Respondent Hadley dismissed Petitioners solely because she wanted to replace the upper management positions with people that would be loyal to her, that shared the same philosophies and beliefs on how the Auditor's office should be run, and to correct problems in the Auditor's office that she attributed Petitioners as part of being. [R.32: Deposition of Hadley at pp. 56-68]. Petitioners' termination had nothing to do with their political beliefs, and indeed, defendant Hadley did not even know Petitioners' political affiliation. [R. 32: Deposition of Hadley at pp. 12-14].

Petitioner, Myra Allison, was employed as "Budgetary Financial Specialist" [R. 32: Deposition of Hadley, Exhibit 1]; Myra Allison was described by others as the "head bookkeeper". She was responsible for approving and issuing requisitions for all county offices. She approved purchase orders with a self-imposed limit of $100,000. [R. 29: A.T. at pp. 24, 128 and 129].

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT CORRECTLY INTERPRETED *HARLOW.* A FACTUAL DISPUTE OVER PETITIONERS' JOB DUTIES DOES NOT PRECLUDE SUMMARY JUDGMENT ON QUALIFIED IMMUNITY, PARTICULARITY WHERE, AS HERE, PLAINTIFFS MAY HAVE COLLUDED WITH THE DEFEATED OFFICEHOLDER IN CHANGING ASPECTS OF THEIR JOBS IMMEDIATELY PRIOR TO THE NEW OFFICEHOLDER TAKING OFFICE.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), this Court held that government officials performing discretionary functions generally are shielded from personal liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In arriving at this standard, the Court expressly rejected any requirement of subjective good faith on the part of the government official, since:

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in [*Butz v. Economou,*

> 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rule of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. An official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

457 U.S. at 815-816.

In other words, since the very essence of the qualified immunity defense is to provide protection to the government official, this Court deleted the subjective good faith requirement because it would frequently be considered a question of fact for the jury, not resolvable on a summary judgment motion.

In the present case, the Petitioners argue that the availability of qualified immunity must, in a patronage dismissal situation, always depend on the actual job duties that the employee was performing for the defeated officeholder at the time the new officeholder took office. But, just like subjective good faith, the plaintiff's actual job duties will frequently be in dispute and, just like subjective good faith, not resolvable on a summary judgment motion. The discharged employee will attempt to show his or her actual job duties were routine, nonpolicymaking, nonconfidential, nonsupervisory, etc. while, on the other hand, the government official will attempt to show exactly the opposite.

Using the Petitioners' proposed "actual job duties" standard would completely annihilate the qualified immunity defense and, just as with the subjective good faith element jettisoned in

Harlow, frequently generate material issues of fact that cannot be resolved on a summary judgment motion. For the same reasons that this Court rejected a requirement of subjective good faith for qualified immunity, it likewise must reject any proposed standard of "actual job duties" for qualified immunity in patronage dismissal cases.

Not only would Petitioners' proposed standard lead to frequent denials of summary judgment on qualified immunity, but also it would extend an open invitation to patronage employees of a defeated officeholder to collude with the officeholder, after his or her defeat but prior to installment of the newly elected official, to downgrade their job titles and responsibilities. There is evidence that happened here. As noted by the Court of Appeals:

> At the time that Defendant, Hadley, was elected, Plaintiffs, Judy Baker and Bonnie Johnson, held the positions of office manager and chief deputy auditor, respectively. However, on December 17, 1990, prior to the date Hadley took office, both Baker and Johnson submitted resignations from their job titles but continued to work for Auditor Bell. Baker and Johnson's job responsibilities did not change after they resigned from their respective titles. Prior to taking office, Auditor-Elect, Hadley, received a letter from then Auditor Bell that provided Hadley with descriptions of Plaintiffs' jobs. Bell described Plaintiff Baker's position as "Estate Tax/Estate Inventory/License Clerk," Plaintiff Johnson's position as "Settlement/Abstracts/ Tax Rate Specialist," and Plaintiff, Myra

> Allison's position as "Budgetary Financial Specialist." . . .

Court of Appeals at p. 2.

So, in the short time between Patricia Hadley's election and her actually taking office, Petitioner, Baker, went from "Office Manager" to "Clerk," and Petitioner, Johnson, went from "Chief Deputy Auditor" to "Specialist". The Petitioners claimed the title changes were insignificant and did not alter their duties which at all times were routine, nonpolicymaking, nonconfidential, etc. But, the District Court noted that Petitioners, Baker and Johnson, had resigned not just titles but "supervisory authority" immediately prior to Patricia Hadley taking office. [R. 49: Court of Appeals at p. 6].

Petitioners would have Patricia Hadley's personal liability turn on their machinations with the defeated Auditor as to their job titles and responsibilities. If this were the standard for qualified immunity, no one in America would want to run for public office. The ability of newly-elected officeholders to discharge any employees of the prior administration without incurring personal liability would depend on how the defeated incumbent and his or her patronage employees choose to define their positions immediately prior to the new officeholder assuming office.

II.

THE SIXTH CIRCUIT CORRECTLY REVERSED THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT AND REMANDED FOR A DETERMINATION WHETHER IT WAS CLEARLY ESTABLISHED THAT PUBLIC EMPLOYEES *IN PETITIONERS' POSITIONS* COULD NOT BE FIRED FOR THEIR POLITICAL AFFILIATIONS.

In arguing for a change of the qualified immunity standard to one of "actual job duties," the Petitioners have grossly mischaracterized the Sixth Circuit's legal standard for when a position is protected from patronage dismissal. Petitioners declare the Sixth Circuit's standard is a wholly "subjective" one depending entirely on the officeholder's subjective intentions for the position.

However, the Sixth Circuit never applied such a standard here. In relevant part, it stated:

> Courts have applied the *Elrod* and *Branti* framework for assessing the constitutionality of patronage dismissals on a case-by-case basis, examining each position individually . . . In this regard, this Court has analyzed the duties and responsibility of several positions and held that they did not enjoy the right to be free from patronage dismissal . . . We have instructed that when analyzing "whether political considerations are appropriate in making personnel decisions *for a certain position,* we must examine the inherent duties of that position and the duties that the new holder of that position will perform."

. . . [T]he District Court erred in its analysis of whether the law prohibiting patronage dismissals was clearly established at the time Hadley dismissed Plaintiffs by failing to consider whether it was clearly established that employees *in the particular positions at issue in the case,* in light of the responsibilities inherent in those positions, were protected from patronage dismissal. . .

This determination is not precluded by the parties' dispute regarding Plaintiffs' previous job duties at the County Auditor's Office under Auditor Bell. In *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991), we explained that when determining whether political considerations are appropriate in making personnel decisions for a certain position, a district court should not look to the duties previously performed by the plaintiff. Instead, the Court must examine the inherent duties of that position and the duties that the new hiring authority, i.e., Hadley, reasonably envisions that the holder of that position will perform. *Faughender*, 927 F.2d at 913. In this case, the record does not contain any evidence of what duties Patricia Hadley envisioned that the holders of Plaintiffs' positions would perform. We hold that the District Court erred by failing to consider the duties inherent in Plaintiffs' particular positions and Hadley's plans for the employees holding such positions in determining whether the law was clearly established that

> Plaintiffs' positions were protected from patronage dismissal at the time that Hadley discharged Plaintiffs, and we shall remand these questions to the District Court for further consideration.

Court of Appeals at pp. 9-10 (emphasis in original).

Contrary to Petitioners' assertions, the Sixth Circuit did not say that qualified immunity depends on what the officeholder subjectively intended to be the duties of the position. Rather, it instructed the District Court to reconsider whether, in view of the *inherent* duties of the Petitioners' positions *or* the duties that Patricia Hadley *reasonably envisions* for the positions, the law was so clearly established at the time of Petitioners' terminations that a reasonable official would have understood that their terminations violated their First Amendment rights.

This is a two-prong analysis. Patricia Hadley is entitled to qualified immunity based *either* on the inherent duties of the positions *or* on the duties she reasonably envisions for the positions. The District Court never reached either of these questions, incorrectly finding the material issues of fact regarding Petitioners' job duties precluded summary judgment.

The Sixth Circuit's standard is fully in line with the Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Anderson*, the Court emphasized that "[t]he operation of this standard [*i.e.*, the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken]. . . depends substantially on the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. The Court discussed the dangers of defining the relevant legal right too generally, and held that "the right the official is alleged to have violated must have been "clearly

established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Thus, in *Anderson,* which involved a warrantless search of a residence, this Court held that "It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that [the defendant's] search was objectively legally unreasonable," and held that the lower court should have considered whether it was "clearly established that the *circumstances* with which [the defendant] was confronted did not constitute probable cause and exigent circumstances." *Id.* at 640-41 (emphasis added).

Plainly, then, a court must look at the particular circumstances with which the officeholder was confronted in deciding whether the law was clearly established. Insofar as patronage dismissals are concerned, the particular circumstances include the positions, the inherent duties of the positions, and the duties for the positions reasonably envisioned by the newly-elected officeholder. As to the latter, the operative word is "reasonably" envisions. This is not a question of subjective intent, but of legal reasonableness consistent with the standard of objective legal reasonableness set forth in *Harlow.*

In the case at bar, neither the Petitioners nor the District Court cited *any* decision of the Supreme Court or the Sixth Circuit which had addressed the issue of political patronage in the hiring or firing of *employees of a county auditor* — let alone employees of a county auditor *in the respective positions of the Petitioners.* Neither did the Petitioners or the District Court cite any case sufficiently analogous that a reasonable official would understand from its resolution that it is a First Amendment violation to dismiss any of the Petitioners. Although Petitioners

claim that *Elrod v. Burns*, 427 U.S. 347 (1976), is factually the same as the present case, in truth it is not even remotely similar. It is just a general statement of the principle that nonpolicymaking and nonconfidential employees cannot be dismissed for patronage reasons.

Finally, while Petitioners complain loudly about the "reasonably envisions" part of the standard (improperly characterizing it as a subjective one), they totally ignore the "inherent duties" aspect. They simply assert that the only correct standard is one based on their actual job duties. Because their proposed standard is clearly contrary to law and public policy, it must be rejected. That decision alone disposes of the present appeal. Furthermore, it remains to be seen how the District Court will apply the Sixth Circuit's "inherent duties" and "reasonably envisions" criteria, so that any appeal in the regard is entirely premature.

III.

THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE MORE RECENT HOLDINGS ENUNCIATED BY THE UNITED STATES SUPREME COURT.

The Petitioners attempt to advance the argument the Sixth Circuit's decision below conflicts with a decision of the Seventh Circuit in *Nelkolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981). This argument is wide of mark for a number of reasons.

First of all the holding in *Nelkolny* has been misinterpreted by the Petitioners. Unlike the case at bar, the Plaintiffs' claim in *Nelkolny* had proceeded to trial. The Seventh Circuit reversed a directed verdict in favor of the Plaintiff Senior Citizen's Coordinator. That Plaintiff, like the three Petitioners herein, was among the four highest paid employees within the office of the

Township Supervisor, which tended to signify a position of some influence. The court found a reasonable juror could conclude that the Plaintiff was a policymaker and remanded the matter for a finding by the trier of fact.

Secondly, there is no conflict with other, more recent Seventh Circuit decisions. Repeatedly that court has found that law with regard to specific positions is not clearly established. In the case of *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), the Seventh Circuit found that the law was not clearly established with regard to the firing of deputy sheriffs, in spite of the fact that there was split authority on the exact same positions. The Petitioners, herein, have never been able to cite a specific legal precedent of an Auditor's office employees being wrongfully terminated for political reasons. The Seventh Circuit Court stated in *Upton:*

> While a circuit split is not helpful in determining whether or not a deputy sheriff is protected by the First Amendment from patronage firing, such a split is indicative of the fact that the deputy sheriff's rights in this regard are currently unsettled as a matter of constitutional law and therefore were not "clearly established" at the time of the deputies' firings.

930 F.2d at 1217. In arriving at that decision the court cited other Seventh Circuit authority that was decided after *Nelkolny:*

> [i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not

> previously identified as unlawful. *Greenberg v. Kmetko*, 840 F.2d 467, 472 (7th Cir. 1988) (quoting *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). *See also Cygnar v. City of Chicago*, 865 F.2d 827, 843 (7th Cir. 1989). What is important, in the final analysis, is "whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir. 1988) (quoting *Wade v. Hegner*, 804 F.2d 67, 71 (7th Cir. 1986).
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> Immunity should be applied unless "it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987). To prove the presence of a clearly established constitutional right, the plaintiff must point to "closely analogous cases" decided prior to the defendants' challenged actions. *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Circuit), *cert. denied*, 488 U.S. 968, 109 S. Ct. 497, 102 L. Ed. 2d 534 (1988).

930 F.2d at 1212.

Finally, *Nelkolny* was decided *before* the Supreme Court's decision in *Anderson v. Creighton, supra.* In *Anderson* the Court stated:

> The right the official is alleged to have

> violated must have been "clearly established" in a "particularized" way and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

483 U.S. at 640.

In *Nelkolny* the Seventh Circuit did not look for "particularized" case law that was later mandated by the Supreme Court in *Anderson*. For that reason, the 1981 case of *Nelkolny* cannot be considered in conflict with the Sixth Circuit decision. The writ should be denied so that the evidence needed on the positions can be considered by the trial court.

IV.

THE COURT OF APPEALS CORRECTLY EXERCISED JURISDICTION OVER THE INSTANT INTERLOCUTORY APPEAL.

The Petitioners argue that material issues of fact precluded the Sixth Circuit Court of Appeals from considering Patricia Hadley's interlocutory appeal of the denial of summary judgment on the issue of qualified immunity. Contrary to that argument, the Sixth Circuit found that the claimed disputed past duties of the Petitioners was not the determinative factor. The District Court had erred in its analysis of whether the law prohibiting patronage dismissals was clearly established when the Respondent terminated the Petitioners' employment. Thus, a legal question was decided. Even if there is an issue of material facts, necessary to be determined for a decision on the issue of qualified immunity, that is a legal question subject to *de novo* review. *Cartier v. Lussier*, 955 F.2d 841, 844 (2nd Cir. 1992).

Interlocutory appeal of the denial of summary judgment motion asserting qualified immunity is warranted because

qualified immunity is not merely a defense to a law suit — it is an "entitlement" not to be sued at all. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Huron Valley Hospital v. City of Pontiac*, 792 F.2d. 563, 566-67 (6th Cir. 1986). The existence of qualified immunity is addressed so early because liability is not the sole public danger of law suits against public officials. The threat of liability and necessary attention to pretrial matters, such as discovery, distract their government functions and discourage able persons from entering public service. *Mitchell, supra.* Interlocutory appeal is appropriate because the entitlement not to be sued is "lost forever" if an immune public official is required to litigate the case all the way to trial. Thus, government officials are generally afforded qualified immunity, shielding them from civil damages, at the earliest stage possible, as long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald, supra.*

The issue of qualified immunity is one of law, and is an appealable final decision. *Mitchell, supra; Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). Since application of the doctrine of qualified immunity to a particular defendant is a question of law, the Sixth Circuit Court of Appeals reviews *de novo* the District Court's determination. *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1982); *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991). The Sixth Circuit has emphatically stated that the issue of qualified immunity should not be left to the trier of fact, but instead is "purely a matter of law for the trial Judge to determine, or for the United States (Sixth Circuit Court of Appeals) to decide on *any* appeal which ought to be taken." *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). In the case at bar, the District Court failed to take heed on the issue and left it undecided:

Depending on the results of the fact finding

> regarding plaintiffs' roles at the County Auditor's office prior to their discharge, qualified immunity may or may not apply. Material issues of fact between the parties prevent summary disposition of qualified immunity issues before this Court.

R. 49: Order, at p.6.

The Sixth Circuit Court properly exercised jurisdiction over the denial of Patricia Hadley's Motion for Summary Judgment on the issue of qualified immunity. The Petition for Writ of Certiorari should be denied.

V.

THE COURT OF APPEALS WAS NOT OBLIGED TO CONSIDER THE PETITIONERS' CROSS-APPEAL ON THE ISSUE OF QUALIFIED IMMUNITY.

The right to an interlocutory appeal is extremely limited. The one relevant exception to the rule against interlocutory appeals was established by the Supreme Court in *Mitchell v. Forsyth, supra.* This Court held that the denial of a *Defendant's* Motion for Summary Judgment on the issue of qualified immunity is immediately appealable. There is no exception for the denial of a *Plaintiff's* Motion for Summary Judgment on whether the elected official is personally liable as a matter of law.

Petitioners' own authority defeats their argument. A court's decision to exercise pendant jurisdiction of a nonappealable District Court ruling is totally discretionary. *Kelly v. Curtis,* 21 F.3d 1544 (11th Cir. 1994). Petitioners have not attempted to demonstrate any abuse of discretion.

Had this issue been decided in the Petitioners' favor it would have had no practical effect on the Sixth Circuit's ruling. The case would most likely be remanded for a determination of additional facts. The Petitioners' argument for "judicial economy" is not persuasive.

CONCLUSION

Therefore, for the reasons stated, Respondent, Patricia Hadley, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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